



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

March 25, 1998

Ms. Linda Cloud
Deputy Executive Director
Texas Lottery Commission
P.O. Box 16630
Austin, Texas 78761-6630

OR98-0796

Dear Ms. Cloud:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 113847.

The Texas Lottery Commission (the "commission") received a request for "copies of the notebooks and all other documents provided to the commission members at the Lottery Commission meeting held on Monday, January 5, 1998, excluding the executive session." You seek a decision as to whether certain responsive information is excepted from disclosure pursuant to sections 552.101 and 552.110 of the Government Code.

Pursuant to section 552.305 of the Government Code, this office informed GTECH Corporation ("GTECH") of the request and of its opportunity to claim the exceptions to disclosure it believes apply to the requested information. GTECH responded by arguing that certain information in a memorandum dated December 30, 1997, from Debra Cloud of the commission to Harriet Miers, Anthony Sadberry and John Hill as Chair and Commissioners of the commission, is excepted from disclosure as a trade secret or as commercial or financial information pursuant to section 552.110.

Section 552.110 protects the property interests of private parties by excepting from disclosure two types of information: (1) trade secrets, and (2) commercial or financial information obtained from a person and privileged or confidential by statute or judicial decision.

The Texas Supreme Court has adopted the definition of "trade secret" from the Restatement of Torts, section 757, which holds a "trade secret" to be

any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers. It differs from other secret information in a business . . . in that it is not simply information as to a single or ephemeral event in the conduct of the business A trade secret is a process or device for continuous use in the operation of the business. . . . [It may] relate to the sale of goods or to other operations in the business, such as a code for determining discounts, rebates or other concessions in a price list or catalogue, or a list of specialized customers, or a method of bookkeeping or other office management.

RESTATEMENT OF TORTS § 757 cmt. b (1939); see *Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex.), *cert. denied*, 358 U.S. 898 (1958).¹

After reviewing the arguments presented by GTECH, we do not believe that the marked financial information is within the Restatement definition of a trade secret. The information seems to relate exclusively to GTECH's Texas lottery operations, which equates to a "single or ephemeral [event] in the conduct of the business" rather than "a process or device for continuous use in the operation of the business." Therefore, the marked information may not be withheld as a trade secret under section 552.110.

Commercial or financial information is excepted from disclosure under the second prong of section 552.110. In Open Records Decision No. 639 (1996), this office announced that it would follow the federal courts' interpretation of exemption 4 to the federal Freedom of Information Act when applying the second prong of section 552.110. In *National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974), the court concluded that for information to be excepted under exemption 4 to the Freedom of Information Act, disclosure of the requested information must be likely either to (1) impair the Government's ability to obtain necessary information in the future, or (2) cause substantial harm to the competitive position of the person from whom the information was obtained. *Id.* at 770.

¹The six factors that the Restatement gives as indicia of whether information constitutes a trade secret are: "(1) the extent to which the information is known outside of [the company]; (2) the extent to which it is known by employees and others involved in [the company's] business; (3) the extent of measures taken by [the company] to guard the secrecy of the information; (4) the value of the information to [the company] and [its] competitors; (5) the amount of effort or money expended by [the company] in developing the information; (6) the ease or difficulty with which the information could be properly acquired or duplicated by others." RESTATEMENT OF TORTS § 757 cmt. b (1939); see also Open Records Decision Nos. 319 (1982) at 2, 306 (1982) at 2, 255 (1980) at 2.

“To prove substantial competitive harm, the party seeking to prevent disclosure must show by specific factual or evidentiary material, not conclusory or generalized allegations, that it actually faces competition and that substantial competitive injury would likely result from disclosure.” *Sharyland Water Supply Corp. v. Block*, 755 F.2d 397, 399 (5th Cir.), *cert. denied*, 471 U.S. 1137 (1985) (footnotes omitted).

After reviewing GTECH’s arguments, we conclude that GTECH’s has failed to demonstrate, beyond conclusory or generalized allegations, that substantial competitive harm would result from release of the information at issue. Therefore, we conclude that the marked information you have submitted may not be withheld pursuant to section 552.110, and therefore you must release it to the requestor.²

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,



Michael A. Pearle
Assistant Attorney General
Open Records Division

MAP/ch

Ref.: ID# 113847

Enclosures: Submitted documents

cc: Mr. Tod E. Pendergrass
Direct Results Legal Service
213 Congress Ave., Suite 200
Austin, Texas 78701
(w/o enclosures)

²Although you also argue that the submitted information is excepted from disclosure pursuant to section 552.101, you refer to no other court cases or laws which would make the information confidential, and we aren’t aware of any. Therefore, the submitted information may not be withheld pursuant to section 552.101.

Mr. Joe Garcia
P.O. Box 1114
Austin, Texas 78767
(w/o enclosures)

Mr. Lowell Lasley
823 Congress Ave.
Austin, Texas 78701
(w/o enclosures)